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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1028

ADOLPH NETZEL,

Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

ODIN H. JOHNSON,
Counsel for Petitioner.

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PETITIONER OF ADOLPH NETZEL FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Adolph Netzel, a citizen of the United States, domiciled in the State of Michigan, respectfully brings this, his application for a Writ of Certiorari, to review the final judgment of the Michigan Supreme Court in this criminal case.

Opinion Below.

Petitioner was convicted of felonious assault in the Circuit Court for the County of Oakland, Michigan, on October 6th, 1939. Motion for new trial was duly made and denied, Appeal to the Michigan Supreme Court perfected, and on

November 13th, 1940, his conviction was affirmed by a divided Vourt (R. 33). The minority opinion for reversal stated in part:

> "Defendant was denied the protection the statute accords".

and further:

> "Other claims of error need not be discussed. *Those that have a semblance of merit will not occur on a new trial.*"

The majority opinion affirming the lower Court cited in support of its opinion *No Cases Except those Involving Capital Offenses,* and further:

> *"I agree with Mr. Justice Butzel that the other alleged errors are without merit and would not justify reversal."*

Application for rehearing was made within the time specified and on February 7th, 1941, said application was denied.

Statutes Involved.

The statute under which defendant was convicted reads as follows:

> "Any Person Who Shall Assault Another with a Gun, Revolver, Pistol, Knife, Iron Bar, Club, Brass Knuckles, or Other Dangerous Weapon, but Without Intending To Do Great Bodily Harm Less than the Crime of Murder, Shall Be Guilty of a Felony." Sect. 17115-82 C. L. 1929 State of Michigan.

and 28.1055 provides:

> "Upon an indictment for any offense, consisting of different degrees, as prescribed in this chapter, the jury may find the accused not guilty of the offense in the degree charged in the indictment and may find such accused person guilty of any degree of such offense,

inferior to that charged in the indictment, or of an attempt to commit such offense."

Jurisdiction.

Jurisdiction of this Honorable Court is invoked under Judicial Code 237, 28 U. S. C. 344 (a)(b). The Judgment of the Michigan Supreme Court was entered November 13th, 1940 (R. 33). Rehearing was denied February 7th, 1941 (R. 34).

Summary Statement of Matter Involved.

On January 21st, 1939, petitioner was arrested by police officers for the City of Pontiac, Michigan, and charged with felonious assault. Petitioner, a man of considerable means, owner of used and new parts establishments in the City of Pontiac, Michigan, had been engaged with an employe in patrolling his used parts yard for the purpose of apprehending thieves. He accosted the complainants near the yard in the early hours of the morning and they, without identifying themselves, drove at a high rate of speed to the local police station with petitioner in hot pursuit. For reasons best known to himself, petitioner elected to represent himself in the trial of the cause. No complaint as to lack of representation by counsel has ever been raised by petitioner either on motion for new trial, appeal or application for rehearing. Nor is it made here. Reference to this matter has been repeatedly injected into the case by the prosecution obviously for the purpose of prejudicing the minds of the reviewing Court. On the trial of the cause the prosecutor asked the defendant if he had been arrested for assault eight years prior to the instant case (R. 11). Petitioner then asked the Court to be allowed to explain this arrest (R. 12). This request was refused by the Court (R. 12-13). Petitioner then requested the prosecutor explain the arrests to the jury (R. 13). This was likewise refused (R. 13).

The Court charged the jury:

> "Under the charge that I have given you and under the proofs as produced, there are only two possible verdicts, one of guilty as charged, the other, not guilty" (R. 18-19).

Exception to this charge was made on motion for new trial (R. 25), on application for leave to appeal (R. 8), and on appeal to the Supreme Court for the State of Michigan. Exception to the ruling against explanation of the prior arrest was likewise duly taken, urged on motion for new trial and on the subsequent appeal.

Questions Presented.

1. Does the failure of the Trial Court, in a prosecution for felonious assault, to instruct the Jury that they may find the accused guilty of inferior and included crimes under:

> "Upon indictment for any offense, consisting of different degrees, as prescribed in this chapter, the Jury may find the accused not guilty of the offense charged in the indictment and may find such accused person guilty of any degree of such offense, inferior to that charged in the indictment, or of an attempt to commit such offense". 17325, 3 C. L., State of Mich. (Stat. Ann. 28.1055).

result in a denial to the accused of his rights under 14th Amend. U. S. Const.?

2. Does the refusal of the Trial Court to allow the defendant to explain to the Jury, *prior arrests without conviction,* touched upon by the prosecution in cross examination, result in denial to defendant of his rights and privileges under the 5th, 6th and 14th Amendments, U. S. Const.?

Reasons Relied On for Allowance of Writ.

The reasons relied on for the allowance of a Writ of Certiorari are:

1. That the constitutional guarantee under U. S. Const. Amend. XIV, Sect. 1 has been denied this petitioner by virtue of the ruling of the Michigan Supreme Court and its construction of the Michigan statute relative to lesser and included offenses. The ruling of the court below makes fish of one and fowl of another. This is clearly set forth in the minority opinion of Mr. Justice Butzel where he says in part:

> "When the possibility of returning a verdict of an included offense is excluded, rather than exonerate the accused completely, they might convict him of the major charge. *Defendant was denied the protection the statute accords*" (R. 30).

2. Petitioner was not afforded a fair trial nor his day in court when the trial Judge denied him the right of *ANY EXPLANATION* of a prior arrest (not conviction) brought out on cross-examination by the prosecutor. This ruling constituted an open and flagrant violation of petitioner's constitutional guarantees under U. S. Const. Amendments V, VI, and XIV.

Transcript.

Your petitioner has heretofore had printed and filed herein the stipulated necessary portions of the record as printed below, together with the proceedings and opinion of the Honorable Supreme Court of the State of Michigan, and due certificate thereon of the Clerk of said court.

Supporting Brief.

Petitioner also files herewith, and makes part of this application, his brief in support thereof.

Prayer.

WHEREFORE, petitioner Adolph Netzel respectfully prays that a Writ of Certiorari may issue to the Honorable Supreme Court of the State of Michigan, to the end that this cause may be reviewed and determined by this Court; and that the Judgment of said Supreme Court of Michigan may be in due course reversed and set aside and that judgment may be rendered in favor of petitioner, setting aside his conviction and sentence pronounced below, and discharging him forthwith; and petitioner prays for all further and necessary orders, proper in the premises, and for all such relief as the nature of the case may justify.

ODIN H. JOHNSON,
Attorney for Petitioner.